Supreme Court, U.S.
FILED
JAN 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

REUBEN B. ROBERTSON, III
ALAN B. MORRISON
LINDA F. DONALDSON

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

ABE DUPLICATORS, INC.–1732 Eye Street, N.W.–Washington, D.C.–298-8837

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
A. The Facts	3
B. The Decision of the District Court	12
C. The Decision of the Court of Appeals	16
SUMMARY OF ARGUMENT	22
ARGUMENT	24
I. THE CIVIL AERONAUTICS BOARD HAS NEVER SANCTIONED DELIBERATE NON-DISCLOSURE OF OVERBOOKING BY RESPONDENT, AND IT HAS CONSISTENTLY ACTED TO PRESERVE ALL COMMON LAW REMEDIES OF OVERSOLD PASSENGERS	24
II. THERE IS NOTHING EITHER EXPLICIT OR INHERENT IN THE AVIATION ACT THAT IS INCOMPATIBLE WITH ALLOWING PASSENGERS TO PURSUE THEIR COMMON LAW REMEDIES FOR DELIBERATE NON-DISCLOSURE OF OVERBOOKING	37

Page

III. THE CIVIL AERONAUTICS BOARD HAS NO POWER TO INSULATE DELIBERATE NON-DISCLOSURE OF OVERBOOKING BY AIRLINES FROM LIABILITY UNDER THE COMMON LAW, AND CERTAINLY COULD NOT DO SO RETROACTIVELY AS THE COURT OF APPEALS HELD 45

IV. ALL DOUBTS ON THE QUESTIONS OF STATUTORY INTERPRETATION SHOULD BE RESOLVED AGAINST THE DECISION BELOW, BECAUSE IT DISRUPTS THE ALLOCATION OF FUNCTIONS BETWEEN THE COURTS AND THE CIVIL AERONAUTICS BOARD 49

CONCLUSION 53

TABLE OF AUTHORITIES

Cases:

Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.,
489 F.2d 203 (9th Cir. 1973),
cert. denied, 417 U.S. 913 (1974) 48, 49

American Airlines v. North American Airlines,
351 U.S. 79 (1956) 17, 37, 38, 49, 50, 51

Archibald v. Pan American World Airways,
460 F.2d 14 (9th Cir. 1972) 15

Civil Aeronautics Board v. Delta Air Lines,
367 U.S. 316 (1961) 49

Cort v. Ash,
422 U.S. 66 (1975) 50

Page

Danna v. Air France,
463 F.2d 407 (2d Cir. 1972) 42

Delta Air Lines, Inc. v. CAB,
455 F.2d 1340 (D.C. Cir. 1971) 43, 44, 47

Double-Eagle Lubricants, Inc. v. State of Texas,
248 F.Supp. 515 (D. Tex. 1965),
appeal dismissed, 384 U.S. 434 (1966) 36

Equitable Life Insurance Co. v. Halsey, Stuart & Co.,
312 U.S. 410 (1941) 14

Federal Trade Commission v. Algoma Lumber Co.,
291 U.S. 67 (1934) 47

Federal Trade Commission v. Colgate-Palmolive Co.,
380 U.S. 374 (1965) 46

Federal Trade Commission v. Klesner,
280 U.S. 19 (1929) 38, 53

Federal Trade Commission v. Sperry & Hutchinson Co.,
405 U.S. 233 (1972) 46

Head v. New Mexico Board of Examiners,
374 U.S. 424 (1963) 36

Holiday Magic, Inc. v. Warren,
357 F.Supp. 20 (D. Wis. 1973),
vacated on other grounds, 497 F.2d 607 (7th Cir. 1974) 37

Holloway v. Bristol-Myers Corp.,
485 F.2d 986 (D.C. Cir. 1973) 45, 46, 51

Hughes Tool Co. v. Trans World Airlines,
409 U.S. 363 (1973) 36, 48

Page

Isen v. Calvert Corp.,
379 F.2d 1266 (D.C. Cir. 1967) 14

J. I. Case Co. v. Borak,
377 U.S. 426 (1964) 51

Pan American World Airways v. United States,
371 U.S. 296 (1963) 48

Pence v. United States,
316 U.S. 332 (1942) 14

Pennsylvania Railroad Co. v. Puritan Coal Mining Co.,
237 U.S. 121 (1915) 41

Polansky v. Trans World Airlines, Inc.,
523 F.2d 332 (3rd Cir. 1975) 37, 45, 50

Sankin v. 5410 Connecticut Avenue Corp.,
281 F.Supp. 524 (D.D.C. 1968),
aff'd sub. nom., Benn v. Sankin,
410 F.2d 1060 (D.C. Cir. 1969),
cert. denied, 396 U.S. 1041 (1970) 14

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 39, 40, 41, 42, 43

United States v. Kiefer,
228 F.2d 448 (D.C. Cir. 1955),
cert. denied, 358 U.S. 828 (1956) 14

Wills v. Trans World Airlines,
200 F.Supp. 360 (S.D. Cal. 1961) 15

Statutes:

Federal Aviation Act of 1958, as amended . . . . . *Passim*

Page

Section 403(a), 49 U.S.C. §1373(a) 42
Section 404(b), 49 U.S.C. §1374(b) 13
Section 411, 49 U.S.C. §1381 . . . . . 2, *passim*
Section 1106, 49 U.S.C. §1506 . . . . . 3, *passim*

Federal Trade Commission Act, Section 5,
15 U.S.C. §45 . . . . . 38, 46, 51

Securities and Exchange Act, Sections 10(b)
and 14(a), 15 U.S.C. §§78j(b), 78n(a) 51

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 13

28 U.S.C. §1337 13

CAB Orders, Notices and Regulations:

Air Traffic Conference of America No-Show Control
Plan, Order No. E-11658 (August 6, 1957) 26

Domestic Trunkline No-Show Plan, Order No. E-18064,
35 CAB 881 (1962) 28, 29

Domestic Trunkline No-Show Plan, Order No. E-20859
(Docket 11327, May 25, 1964) 30, 31

Eastern Air Lines Overbooking Enforcement Proceeding,
30 CAB 862 (1960) 26, 27

Economic Regulations, 14 C.F.R.
Part 250 . . . . . 12, 14, 28, 34, 35
§250.3 7

§250.6 . . . . . 5, 12

§250.9 7

Page

Emergency Reservations Practices Investigation, EDR-260, Order No. 73-12-93, 39 F.R. 823 (1974) 20

Emergency Reservations Practices Investigation, Initial Decision (Docket 26254, June 10, 1974) . . . 8

Emergency Reservations Practices Investigation, Order No. 75-7-54, 40 F.R. 30150 (1975) 20

National Airlines, Inc., Enforcement Proceeding, 31 CAB 390 (1960) 27

Notice of Proposed Rule Making, EDR-95, 30 F.R. 13236 (1965) 31, 32

Notice of Proposed Rule Making, EDR-109, 32 F.R. 459 (1967) 33, 34

Notice of Proposed Rulemaking, EDR-248, 38 F.R. 15083 (1973) 35

Overbooking Practices of Trunkline Carriers, Order No. E-15615 (Docket 11683, 1960) 27

Regulation ER-503, Enactment of Part 250, 32 F.R. 11939 (1967) 34

Regulation ER-588, 34 F.R. 14281 (1969) 34

Regulation ER-681, 36 F.R. 7306 (1971) 34

Regulation ER-727, 37 F.R. 6924 (1972) 34

Regulation ER-804, 38 F.R. 14822 (1973) 34

Regulation PS-52, 38 F.R. 14823 (1973) 35, 43, 44

Regulation ER-827, 38 F.R. 27604 (1973) 35

Page

Regulation ER-880, 39 F.R. 38087 (1974) 35

Regulation PS-58, 39 F.R. 38095 (1974) 35, 43

Sherman Control and Interlocking Relationships, 15 CAB 876 (1953) 48

Other Authorities:

3 ALI RESTATEMENT, TORTS §529 14

American Airlines, Passenger Service Manual, "Oversold and Inconvenienced Passengers," Sec. 10-63 (1974) 7

Civil Aeronautics Board, "Passengers Denied Confirmed Space – Calendar Years 1974 and 1973" (March, 1975) 9

CAB Office of Compliance, Letter to All Certificated Air Carriers (July, 1956) 25

Eastern Airlines, Standard Practice Manual: Passenger Boarding Irregularities, Sec. 65-6120 (1974) 7

Hearings on Regulation of Transportation of Persons and Property By Aircraft, Before A Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess. (1937) 38

Information Responses and Comments filed by Various Air Carriers in CAB Docket 11683, Overbooking Practices of Trunkline Carriers (Oct. 1960 and Aug. 1961) 28, 30

J. Landis, Report on Regulatory Agencies to the President-Elect (1960) 52

Page

E. Wolff, *et al.*, Report of the Civil Aeronautics Board Advisory Committee on Procedural Reform (1975) 52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 512 F.2d 527 and is set forth as Appendix A to the petition for a writ of certiorari. (Pet. App. A 1-60.)* The decision of the district court is reported at 365 F.Supp. 128

---

* References to the appendices in the petition for certiorari will be designated "Pet. App." followed by the relevant page citations. References to the Joint Appendix filed herewith will be designated "JA" followed by the relevant page citations.

and is set forth as Appendix B to the petition. (Pet. App. B 1-11.)

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1975. A timely petition for rehearing, with suggestion for rehearing en banc, was denied by the court of appeals on June 23, 1975. (Pet. App. C 1-2.) The petition for a writ of certiorari was filed on September 22, 1975, and was granted on November 11, 1975, with Mr. Justice Douglas taking no part in the consideration or decision of the matter. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, notwithstanding a statutory provision preserving common law remedies, the Federal Aviation Act requires that the Civil Aeronautics Board be given the opportunity retroactively to approve fraudulent misrepresentations by an airline that would otherwise constitute actionable torts under state common law, with the effect of extinguishing any private right of action arising from such practices.

STATUTES INVOLVED

Sections 411 and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§1381, 1506, provide:

> Section 411. The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier,

> or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.
>
> Section 1106. Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

STATEMENT

A. The Facts

In early April, 1972 the petitioner Ralph Nader accepted an invitation to make a number of public addresses in the state of Connecticut on behalf of the Connecticut Citizen Action Group ("CCAG"), a non-profit public interest organization concerned with consumer, environmental, and human rights issues. (JA 18.) Mr. Nader's participation was an essential part of the group's plans for a major fund-raising program to elicit much needed financial support from citizens in that state. As a central event in the fund-raising effort, CCAG planned and promoted a "rate-payers rally" to be held during the lunch hour on April 28 in the downtown Hartford business district. To attract a large audience, CCAG arranged to have Mr. Nader address the crowd, preceded by the Mayor and City Council President of Hartford. CCAG anticipated that the rally

would elicit a strong showing of public support for its efforts, both in monetary contributions and in the enlistment of volunteers for canvassing, research, and other projects. (JA 105-106.)

Several days in advance, a confirmed reservation was made for petitioner for the morning of April 28 on Allegheny Airlines flight 864, which was scheduled to arrive at the Hartford airport (Bradley Field) in ample time for him to participate in the rally. (JA 18-19, 112.)[1] CCAG was informed of Mr. Nader's confirmed reservation and made arrangements to meet him at the airport. (JA 107, 112-13.) Petitioner's ticket, which he subsequently purchased from the carrier's agent, specifically indicated, by the standard "OK" notation, that his reservation was confirmed. (Pl. Exh. 1.)

On the morning of his scheduled departure, Mr. Nader arrived at Allegheny's gate at National Airport prior to the departure time, in compliance with all preflight requirements, and presented his ticket for boarding. At the gate, however, petitioner was told by Allegheny's agent that all seats on flight 864 were already occupied and that he would not be accommodated. Several other persons were milling around the gate, also having been refused boarding on the flight despite their confirmed reservations and tickets. (JA 19-20, 100-01.)

Petitioner Nader explained to the agent that it was imperative that he arrive in Hartford in time for his speech and asked the agent, in view of these urgent circumstances,

[1] Flight 864 was the latest flight which would have enabled Mr. Nader to make the rally, although there were earlier scheduled flights that day and, of course, the day before. (JA 31, 108, 114-15.)

to double-check his records to see whether any standby passengers had been boarded on the flight by mistake. The agent refused to perform this simple task, merely repeating that the plane was full and there was nothing he could do about it. (JA 20, 101.) As it later turned out, at least one standby and one person whose reservation had been previously cancelled by the airline were on the plane as a result of "boarding discrepancies". (Pl. Exh. 5, JA 139.)[2] Petitioner then asked the agent whether he or another agent would explain the problem to the passengers on board, with the hope that someone would volunteer to take a later flight and thereby allow Mr. Nader to reach Hartford in time for his speaking engagement. This request also was refused, although making such an appeal would have taken but a moment and the plane did not leave until at least ten minutes later. (JA 21, 83, 85-87.)

Thus, when flight 864 departed, petitioner was literally left standing at the gate, unable to make any other travel arrangements to get to Hartford in time to fulfill his commitment. Allegheny offered Mr. Nader and the other bumped passengers an air taxi flight to Philadelphia, where they might be able to connect with a flight that would arrive in Hartford at 12:15. By arranging for such alternative transportation for the bumped passengers, Allegheny hoped to clear itself of any liability for denied boarding compensation under federal regulations. 14 C.F.R. §250.6 (b). The connection was too close for petitioner to depend on, however. More important, petitioner realized

[2] In addition, Allegheny had no record of any reservations for two other passengers (Demittenaere and Boucher) who were accommodated on the flight. (Pl. Exh. 8, 11.)

that even if he made the connection, he would almost certainly be so late in arriving in downtown Hartford that a lunch hour crowd would have gone back to work by the time he appeared. Petitioner therefore rejected Allegheny's offer and telephoned to let CCAG know that he would not be able to make the rally in Hartford. (JA 22-23, 45.)

Allegheny's failure to honor petitioner's confirmed reservation not only caused him personal inconvenience and embarassment, but also had devastating consequences for CCAG. Its rally in Hartford, planned and promoted on the basis of Mr. Nader's undertaking to deliver the keynote speech, and with the assurance that he would arrive on time by flight 864, was ruined. (JA 106-07.) CCAG thereby lost a unique opportunity to generate contributions at the rally itself, as well as the chance to obtain names and addresses of potential volunteers and contributors drawn to the rally to hear Mr. Nader. Equally important, CCAG suffered loss of its credibility and prestige because of Mr. Nader's failure to appear as advertised.

Mr. Nader had been "bumped" on two prior occasions by airlines other than Allegheny, and in each instance had been led to believe that inadvertence or bureaucratic inefficiency was to blame.[3] Two such mishaps (one occuring during an airline strike) out of the many flights he

[3] Both of the airlines involved in petitioner's earlier bumping experiences apparently have a policy of obscuring the fact that intentional overbooking may be responsible for denial of boarding on their flights. The first, Eastern, currently instructs its employees in its company manual that they should "never use the word 'oversale' in conversation with the denied boarding or within hearing distance of anyone except Company employees involved." Eastern (continued)

had taken did not alert petitioner to question the explanation given for the denial of boarding. (JA 25.) While he had been given a printed statement by the carriers in accordance with federal regulations, that explains to bumped passengers what obligations an airline has to them after a denial of boarding, nothing in that statement suggested that the airline may have engaged in deliberate overbooking. 14 C.F.R. §250.9 (1975). Thus, neither his earlier experience, nor the information he had received from the airlines, nor any published tariff or regulation had revealed to him that bumping might be caused by anything other than human or computer error, weight restrictions, or equipment substitution. (JA 24-25, 33-35, 61, 159-60.)

Petitioner and CCAG were indeed totally unaware that Allegheny had intentionally "overbooked" flight 864 (JA 24, 108), having sold, as of one hour prior to the flight, 107 confirmed reservation tickets for the 100 seats actually available on the aircraft. (Pl. Exh. 4, JA 138). Nor were they aware that Allegheny deliberately and

[3] (continued)
Airlines, Standard Practice Manual: Passenger Boarding Irregularities, Sec. 65-6120, p. 7 (June 4, 1974).

The second, American, which bumped Mr. Nader from a flight five days before the Allegheny incident, states in its employee manual: "Never give an oversold passenger anything in writing which admits an error on the part of American Airlines." It adds: "If a passenger asks reason for oversale, tell him that the reason will be known only after an investigation has been concluded and all facts are revealed." American Airlines, Passenger Service Manual, "Oversold and Inconvenienced Passengers", Sec. 10-63, p. 5 (Sept. 30, 1974).

Both of these documents are on public file at the Civil Aeronautics Board in the Office of the Chief, Passenger and Cargo Rates Division, Bureau of Economics, pursuant to 14 C.F.R. §250.3 (1975).

systematically overbooks its flights whenever possible, in order to enhance company profits by offsetting the effect produced when passengers with reservations fail, for one reason or another, to show up for a flight.[4] (JA 25, 108, 123-24.) Also by overbooking rather than placing people on wait-list status or refusing to accept additional reservations, Allegheny is able to retain the business of customers who might otherwise make their travel arrangements with competing airlines. Allegheny's management continues to overbook, despite its certain knowledge that the practice requires it to dishonor confirmed reservations and thereby

[4] Only a small proportion of the airline industry's "no-show" problem is caused by passengers' failure to cancel reservations that they do not intend to use. A recent investigation by the Civil Aeronautics Board resulted in the following conclusions by its Administrative Law Judge, which no one has challenged:

> The no-show problem is, however, considerably more complex and elusive than the difficulties presented by willful misuse of the reservations systems. The passenger may, for example, fail to cancel or utilize space for a number of reasons beyond his control – clogged telephone lines at the carriers' reservations office, traffic accidents, unavoidable surface transportation delays, illness and family or business emergencies, to mention a few. A fair consensus of the judgment of the carriers is that 50% or less of all no-shows are caused by the actions of passengers, intentional or otherwise.
>
> The balance of the no-shows are carrier-caused, an area that has not been emphasized in past no-show programs. Again, no-shows generated by the carriers can arise in a number of different situations, some avoidable and some not. Common reasons would be human and computer errors in reservations records and the failure of passengers to show because of misconnections.

Emergency Reservations Practices Investigation, CAB Docket 26253 Initial Decision, p. 9, (June 10, 1974).

disrupt travel plans[5] for literally thousands of its customers each year.[6]

Had petitioner or CCAG known in time that Allegheny would overbook flight 864, creating a substantial and predictable risk that some passengers would be "bumped" from the flight, they could and would have made other arrangements to assure his timely arrival in Hartford, either on an earlier flight or by another mode of transportation. (JA 24, 108.) It is hardly surprising, however, that they considered the confirmed reservation for flight 864 to be the carrier's assurance of accommodation on that flight, because Allegheny wants its customers and those awaiting their arrival to have precisely that understanding.[7] Instead of disclosing the truth about its overbooking practice to the public and its passengers, Allegheny has made a concerted effort to conceal and obscure it. In advertising its

[5] JA 135-36. If Allegheny's officials were unaware of the inconvenience and economic loss its policy inflicts upon its customers when denied boarding occurs, certainly the irate correspondence they receive from the victims of bumping should be sufficient to dispel that ignorance. (JA 152-168.)

[6] For example during April 1972 when petitioner's reservation for flight 864 was dishonored, Allegheny denied boarding to a total of 945 persons holding confirmed reservations – over 30 a day on this one airline. (Pl. Exh. 13.) From January 1969 to August 1972, Allegheny bumped almost 16,000 prospective passengers from its flights. (*Id.*) It is clear, however, that overbooking is by no means unique to Allegheny: all the major scheduled airlines indulge in it to some degree. In the most recent year for which CAB industry statistics are available, it appears that over 100,000 passengers were denied boarding on scheduled domestic flights. Civil Aeronautics Board, Passengers Denied Confirmed Space – Calendar Years 1974 and 1973 (March, 1975).

[7] Allegheny's president testified that, subject to "the normal latitudes" of weather and mechanical problems, a confirmed reservation is intended to give a "reasonable assurance of fulfilling one's

(continued)

reservations and related services to the public, for example, the company emphasizes dependability and reliability with not the slightest warning about overbooking or bumping. (JA 118-19.) Further, Allegheny employees are instructed to tell customers bumped due to overbooking that the difficulty has been "caused by an unintentional error made in confirming reservations for the flight," or by "equipment substitution" or "weight restriction" – anything but the true cause. (Pl. Exh. 6, JA 148.)[8] Indeed, the agent responsible for denying boarding to petitioner acknowledged that he would not reveal to passengers that their bumping was due to overbooking:

> A. I usually would advise the passenger that there has been a mistake, exactly what it is, I don't know, unless, of course, it is an equipment substitution, or something like that.
>
> Q. You would not advise him that an intentional overbooking policy may have caused his distress?

7 (continued)
plan, whether it be business or pleasure." (JA 117.) He further testified:

> Q. What is a confirmed reservation on Allegheny?
>
> A. When a passenger calls, if seats are available it's confirmed. . . .
>
> Q. . . .[W]hat is the passenger entitled to expect when he gets a confirmed reservation?
>
> A. Well, he would expect, normally, to have a seat.
>
> Q. And what does Allegheny want him to expect, just that?
>
> A. Of course. (JA 118.)

8 Indeed, many of its own employees are probably unaware that Allegheny engages in deliberate overbooking. Its Passenger Service Manual does not even suggest overbooking as a possible cause of oversales. (Pl. Exh. 6, JA 145.)

> A. No, I don't think I would.
>
> Q. And that is because you do not think it is good publicity for the company, do you?
>
> A. That is true. (JA 96.)

The deception is not restricted to lower echelon employees but extends throughout the company. In correspondence about bumping problems, even the company's top management covers up its overbooking policy, invariably giving assurance that the incidents are isolated and accidental, rather than the inevitable consequence of Allegheny's deliberate practices:

> The oversale at Hartford was indeed unplanned, and I wish to assure you that Allegheny does not purposely oversell any flight. (JA 157.)

> . . . I agree that the oversale of this flight or any other flight is not the kind of service our valued customers deserve. Please be advised that each and every oversale is investigated with corrective action instituted in an effort to prevent recurrence. (JA 159.)

> Oversales are few when compared to the number of departures . . . . However, through human or computer error if we are not properly advised, our total number of commitments do occasionally exceed our total number of seats available. (JA 160.)

> . . . I deeply regret the fact that you were denied a seat on one of our March 9 flights to Washington. . . . . In today's computerized environment, this should not have happened and

> we are probably more interested in the cause than even you are. (JA 165.)
>
> . . . in August of 1970, Allegheny introduced a computerized name and flight reservation system and this has reduced the number of oversale incidents considerably. (JA 168.)

Thus, intentional overbooking – and the attendant risk of dishonored reservations – has been treated virtually as a top secret matter by Allegheny. The company knows full well that the disruption of travel plans because of oversales may result in serious upset, inconvenience, and even economic losses to the unlucky travelers, as well as persons awaiting their arrival. Yet it holds out and offers to the public what it characterizes – and hopes will be relied upon – as firm reservations assuring accommodations on specified flights, without revealing that not all reservation holders can in fact be accommodated. This deliberate practice of intentional concealment by Allegheny provides the factual backdrop for the issue presented to the Court in this case.

B. The Decision of the District Court

Regulations of the Civil Aeronautics Board, 14 C.F.R. Part 250 (1975), generally require airlines to tender compensation to passengers with confirmed reservations who have been denied boarding, unless the airline can arrange comparable transportation that will reach the passenger's destination within two hours of the time his original flight was scheduled to arrive.[9] The denied boarding

[9] Other conditions that relieve airlines of the obligation to tender denied boarding compensation are not relevant to this case. See 14 C.F.R. §250.6.

compensation, equivalent to the value of the passenger's ticket, so long as it is more than $25 or less than $200, serves as "liquidated damages" if accepted by the passenger. As Allegheny concedes, however, the remedy provided by the CAB is not exclusive and the passenger need not accept it. (JA 72-73.) When Allegheny tendered $32.41 to petitioner to compensate him for the damages attendant upon its failure to honor his confirmed reservation, Mr. Nader chose to reject the offer and, together with CCAG, filed a damage action against Allegheny in the United States District Court for the District of Columbia. (JA 1-6.)

Two distinct bases for liability were set out in the complaint. One was a claim of fraudulent misrepresentation, based on Allegheny's intentional concealment of its overbooking practice in connection with the confirmation of reservations. Jurisdiction over this "state" claim, arising under the common law of the District of Columbia, was based on diversity of citizenship. 28 U.S.C. §1332.[10] Additionally, the suit contended that the carrier had violated its duty of non-discrimination under section 404(b) of the Federal Aviation Act, 49 U.S.C. §1374(b), by failing to afford petitioner the boarding priority appropriate to his confirmed reservation. Federal jurisdiction over the statutory claim was asserted and found under 28 U.S.C. §1337.

After extensive pre-trial proceedings, the case was tried before the court without a jury. On October 18, 1973, the district court entered a judgment for petitioner on

[10] The district court also found the non-federal claim to be properly before it under the pendent jurisdiction doctrine. (Pet. App. B 7.)

both the misrepresentation and discrimination claims, awarding him $10 in compensatory damages and $25,000 in punitive damages. Judgment was also entered for CCAG on its misrepresentation claim, with an award of $51 in compensatory damages and $25,000 in punitive damages. (Pet. App. B 10.)

Allegheny had contended that the Federal Aviation Act gave the Civil Aeronautics Board exclusive jurisdiction to consider the legality and propriety of airline reservations practices, ousting entirely the court's common law jurisdiction with respect to such practices. However, its own expert witness on the CAB's regulatory policies testified that, while the Board had never banned overbooking outright, it had expressly recognized and sought to preserve the right of passengers to pursue common law claims for damages suffered as a result of overbooking. (JA 72-73.) Citing that testimony and the CAB's regulations, 14 C.F.R. Part 250, the trial court rejected the contention that its jurisdiction had been preempted. (Pet. App. B 5.)

Proceeding to consider the fraudulent misrepresentation claim, the district court applied the common law definition of that tort under local law.[11] Allegheny, the court found, holds itself out to the public through advertising and other means as offering reliable reservations which, if confirmed by the airline for a particular flight, will assure the prospective passenger of a seat on that flight. (Pet.

[11] See *Isen v. Calvert Corp.*, 379 F.2d 1266 (D.C. Cir. 1967); *Sankin v. 5410 Connecticut Avenue Corp.*, 281 F.Supp. 524 (D.D.C. 1968), *aff'd sub nom., Benn v. Sankin*, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970); see also *Pence v. United States*, 316 U.S. 332, 338 (1942); *United States v. Kiefer*, 228 F.2d 448 (D.C. Cir. 1955), *cert. denied*, 358 U.S. 828 (1956); 3 ALI RESTATEMENT, TORTS §529, quoted with approval in *Equitable Life Insurance Co. v. Halsey, Stuart & Co.*, 312 U.S. 410, 425-26 (1941).

App. B 4.) On the other hand, according to the district court's findings, the company is aware that its substantial overbooking practice inevitably results in the denial of boarding to some passengers holding reservations, thereby causing "severe distress and financial loss" to persons relying on such confirmed but dishonored reservations. Yet nothing in Allegheny's advertising makes the public aware of its intentional overbooking practice or the fact that there is "a substantial risk that confirmed reservations will be dishonored." (Pet. App. B 4.) The trial court concluded that Allegheny had knowingly misrepresented a material fact in confirming the petitioner's reservation, namely that he had a guaranteed reservation for a seat on the flight;[12] that this was actually and reasonably relied on by the plaintiffs; and that it resulted in injury to the plaintiffs for which the carrier was liable. (Pet. App. B 7-8.)

The Court also found the carrier liable to petitioner on the discrimination claim, based on the fact that it dishonored his confirmed reservation while permitting passengers with subsequent or no reservations to be accommodated. Allegheny, it was concluded, failed to sustain its burden of proof under *Archibald v. Pan American World Airways*, 460 F.2d 14 (9th Cir. 1972), and *Wills v. Trans World Airlines*, 200 F.Supp. 360 (S.D.Cal. 1961), that it had adhered to reasonable and nondiscriminatory policies in barring petitioner from the flight. Moreover, because Allegheny acted knowingly and willfully, and in light of the airline's responsibilities to the community as a common carrier, its holding out to the public that

[12] In the opinion of the circuit court, the case involved "non-representation" rather than "misrepresentation." This distinction arose from the fact that, while Allegheny admittedly confirmed petitioner's reservation, there was no evidence in the record that it "guaranteed" a seat. (Pet. App. A 26.)

confirmed reservations assure accommodation on particular flights, its stress on reliability in its advertising, and its awareness of the harm likely to occur when passengers are bumped, the district court concluded that punitive as well as compensatory damages were in order. (Pet. App. B 6, 9.)

C. The Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court. With respect to the federal statutory claim, the circuit court considered the lower court's findings so ambiguous that it could not ascertain whether the proper legal standard had been applied, specifically whether Allegheny was found to have affirmatively violated its own priority rules in refusing accommodation to petitioner. That aspect of the case was remanded for further findings by the trial court and is not before this Court.

As to the petitioner's common law misrepresentation claim, the circuit court held that "it is manifest that Nader was not in privity with Allegheny at the time of the misrepresentation nor was he identified as a person to whom the misrepresentation was directed." (Pet. App. A 42.) Nevertheless the court determined that petitioner was within the class of potential passengers whom Allegheny "intended to influence" and could therefore recover for his reliance on the misrepresentation. (*Id.*) The court decided, however, that CCAG was "a party more remote to the transaction," "really a member of a vast indeterminate class that may be equated with the public itself." (*Id.*) The fact that Allegheny admittedly knew that persons other than passengers rely as a matter of course on

its confirmed reservations and may suffer injury when reservations are not honored (JA 119-20, 135-36) did not bring CCAG within the class of third persons who could recover for the carrier's intentional tort. In the court's view, "foreseeability is not the test," for if it were, "virtually any plaintiff, no matter how far removed from the transaction or incident, could recover the full amount of his damages." The court concluded, "CCAG cannot recover as Allegheny's duty did not extend to it." (Pet. App. A 43, footnote omitted.)

In considering the carrier's liability to petitioner under the common law misrepresentation claim, the circuit court correctly rejected respondent's contention that the CAB has exclusive regulatory authority over airline practices which totally preempts the jurisdiction of the courts to entertain such damage actions. (Pet. App. A 26-28.) It proceeded, however, to focus on what it perceived as a potential area of conflict between the common law and the regulatory powers vested in the CAB, imposing a solution that had not been suggested in any brief or at oral argument by any party or *amicus*, including the Board itself upon which new functions were being thrust. The majority, entirely on its own, concluded that the common law damage claim had to be remanded to the district court and stayed pending referral to the CAB to determine whether the practices in question were "unfair or deceptive" within the meaning of section 411 of the Federal Aviation Act, 14 U.S.C. §1381. (Pet. App. A 32-33.) Starting from language contained in this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), as to the scope and extent of the Board's regulatory powers over the airline industry, and combining it with an assumption that reservation practices have a significant relationship to rates

for air transportation, the circuit court concluded that "the common law remedies for fraud and deceit cannot remain totally unaffected by" the Aviation Act. The court reached this conclusion despite the plain and contrary language of section 1106 and the fact that the only provision viewed as in potential conflict with the common law claim, section 411, appeared on its face designed to enable the CAB to search out and prevent conduct similar to the conduct against which a common law misrepresentation claim is directed. Congress, the court reasoned, must necessarily have intended the Board's authority "to include the approval in the public interest of some practices that might be considered common law misrepresentations." (Pet. App. A 30.) The method by which the CAB "approves" otherwise actionable deceptions is to investigate them under section 411 and thereafter to determine that the public interest does not merit issuance of a cease and desist order against them. The court went on to rule that if the Board did in fact exercise its power in this manner,

> [T]he effect of such approval, or a holding that they do not represent deceptive practices, would be to establish that the practices, as a matter of law, do not constitute common law misrepresentations. (*Id.*)

In that event, no common law right to recover damages as compensation for injuries suffered as a result of such practices would survive the CAB's determination. (Pet. App. A 31.)

Here, however, it is clear that in fact the CAB has never ruled that any airline's overbooking or related practices are not deceptive, or otherwise should be approved. Yet the circuit court decided that the CAB's approval of

questionable airline practices could take place not only on a prospective basis, but *retroactively* as well, in effect eradicating a common law tort claim after it had arisen. The very enactment of the Aviation Act necessitated such an "alteration of the common law," the court wrote, so that the Board would be able to regulate the industry effectively. (*Id.*) As a result, according to the opinion below, the duty of determining whether any given practice is deceptive or unfair for purposes of common law liability has been reassigned from the courts to the CAB:

> Given this interpretation, when the allegedly tortious practice is one that has been directly regulated by the Board, or while not regulated is so obviously tied to a regulated practice or rate that a change in one would require a change in the other, the Board must determine, in the first instance, whether the practice falls within the ambit of the deceptive practices provision of section 411.[13]

The court thus concluded that the judgment in favor of petitioner had to be reversed and remanded to the trial court, to await a definitive ruling from the CAB as to whether the practices in question were considered to be deceptive within the meaning of section 411. This approach was especially suitable, in the court's view, because "the problems are as wide as the industry itself, [so] a single, industry-wide resolution is appropriate."[14]

---

[13] *Id.* In footnote 40, omitted from the above quotation, it was noted that a finding of deceptiveness by the Board would not itself establish common law liability, since other elements of the tort would remain to be adjudicated by the court.

[14] Pet. App. A 32. Industry-wide regulation, of course, was precisely what the Board concluded in 1967 it should *not* attempt. See discussion below, pp. 24-36.

The court noted, however, that it might not actually be necessary for the parties to this suit to undertake a new adjudicatory proceeding before the Board. It took judicial notice of a rulemaking proceeding that had been initiated by the Board at the height of the 1973-74 fuel crisis to determine whether that situation necessitated changes in the carriers' reservations practices.[15] The court then expressed its view that that proceeding provides an appropriate forum for the agency to determine whether Allegheny's overbooking practices were deceptive under section 411, in effect directing the agency to proceed with that determination in the fuel crisis proceeding.[16]

---

15 *Emergency Reservations Practices Investigation*, EDR-260, CAB Docket 26253.

16 In initiating the *Emergency Reservations Practices Investigation* on December 21, 1973 – over three months after the district court issued its decision in this litigation – the Board did *not* invoke its powers under section 411. See CAB Order 73-12-93, 39 F.R. 823 (1974). That fact, and the fact that the CAB's Administrative Law Judge excluded from the record any evidence pertaining to the Allegheny practices at issue in this litigation, (Transcript of Hearing, Jan. 31, 1974, CAB Docket 26253, pp. 109-10, 116) seem to have been overlooked by the court of appeals. Apparently because a consumer group which intervened in the proceeding had suggested that the Board prospectively ban overbooking, the court assumed that the Board would proceed in that investigation to pass upon the legality of those practices. In July 1975 the Board solicited recommendations from interested parties as to what course of action would be appropriate for it to take, in response to the court of appeals' decision, with respect to the Allegheny practices at issue, and it also indicated its intention to initiate a new rulemaking proceeding to review once again the problem of ticket oversales. Order No. 75-7-54, 40 F.R. 30150 (1975).

Senior Circuit Judge Fahy strongly dissented from this unprecedented holding that, in his words, "now vests the Board with decisional authority to determine that an individual who has suffered injury due to a carrier's fraudulent misrepresentation, and who would otherwise have a common law remedy, would have no such remedy should the Board determine the conduct was not deceptive." (Pet. App. A 52.) Troubled by the obvious conflict between the court's holding and the express preservation of common law remedies in section 1106 of the Aviation Act, as well as the realignment of the respective functions of courts and regulatory agencies, Judge Fahy wrote as follows:

> . . . the court thus divests itself not only of the authority to adjudicate a claim of fraudulent misrepresentation but also vests the Board with authority to define fraudulent misrepresentation in a manner which the courts must accept for the airline industry. I do not find that Congress has so provided or intended. Indeed, section 1106 seems to me clearly to the contrary. Section 411 affords, or denies, only a statutory remedy, unknown to the common law. (*Id.*)

The adjudication of common law tort claims, in Judge Fahy's view and petitioner's, is a job for the courts alone, entirely independent of the CAB's jurisdiction to control deceptive practices under section 411 of the Aviation Act. (Pet. App. A 53.)

SUMMARY OF ARGUMENT

The decision below is premised on several fundamental misconceptions. First, it misapprehends the manner in which the CAB has chosen to deal with airline oversales by viewing a policy of deliberate non-intervention as positive approval of all practices adopted by the airlines. Second, it reads into the interstices of the Federal Aviation Act an intent to abrogate a common law claim of misrepresentation, despite the fact that the tort claim is perfectly consistent with the Act and is preserved by a savings clause. Third, it misreads section 411 of the Act, which was designed to prevent deception, and thereby converts it into a basis for approving fraudulent misrepresentations. And, finally, it disrupts the traditional functional balance between federal regulatory agencies and common law courts.

The CAB has on a number of occasions reviewed the problem of airline oversales but, contrary to the opinion of the circuit court, has never sanctioned deliberate, concealed overbooking. The Board has consistently adhered to the view that close, direct federal supervision of carrier reservations systems would entail more drawbacks than potential benefits. It has thus avoided exercising the full extent of its powers under section 411 to ban all overbooking, instead seeking through its regulations to provide some degree of compensation for passengers injured by oversales, and to provide a variety of incentives for the airlines to bring about improvements in their own systems. In taking such actions the CAB has consistently cautioned the carriers against deceiving the public in connection with their reservations practices, and has consistently sought to preserve the rights of persons injured as a result of dishonored confirmed reservations to pursue their remedies

under the common law, as an alternative to the acceptance of denied boarding compensation as liquidated damages.

The circuit court also erred in assuming that national uniformity is so essential in matters involving airline reservations practices that the common law remedies for deliberate nondisclosure of overbooking must be overridden or altered, notwithstanding the express savings provision of section 1106 of the Aviation Act. In fact, the CAB itself has consistently rejected the notion that uniform practices are required in the area of reservations, and has permitted carriers great latitude in determining what kind of reservation systems to offer the public. Certainly any such interest as may exist in having uniform air carrier reservations systems does not meet the test of absolute repugnancy for abridgment or alteration of common law remedies, as established by this Court.

Even more fundamentally, the appellate court concluded that the CAB has power to approve fraudulent misrepresentations, and thus insulate them from tort liability, and that the CAB could do so on a retroactive basis. However, there is nothing in the language, purpose or history of the Aviation Act to support that conclusion, and indeed all of the evidence points to the conclusion that a statute basically intended to assure the public an effective air transportation system cannot be the basis for denying a passenger his day in court.

Finally, the decision of the court of appeals will result in administrative chaos, since every tortious misrepresentation case brought in a state or federal court will have to be funneled through the CAB for a preliminary determination. This will surely impose an unnecessary and inappropriate burden on the CAB, requiring it to proceed in countless

cases of a routine nature. The decision thus constitutes a fundamental reallocation of responsibility between the CAB (and presumably other federal agencies) on the one hand and the state and federal courts on the other. Whatever the wisdom of such a reallocation might be, it is a change that can be dictated only by Congress and not by the courts.

ARGUMENT

I. THE CIVIL AERONAUTICS BOARD HAS NEVER SANCTIONED DELIBERATE NONDISCLOSURE OF OVERBOOKING BY RESPONDENT, AND IT HAS CONSISTENTLY ACTED TO PRESERVE ALL COMMON LAW REMEDIES OF OVERSOLD PASSENGERS.

Every year, a significant number of prospective passengers arrive at airline flight gates with what they believe to be confirmed reservations, only to be denied seats on their flights. For some time the CAB has been concerned about this situation and has considered various proposals designed to correct it. The opinion of the circuit court traced a portion of the history of CAB concern, concluding that the Board's conduct reflected approval of the practice of deliberate overbooking as being "in the public interest." (Pet. App. A 14.) As the discussion below will reveal, the accuracy of this characterization is open to serious question. But regardless of how that issue is resolved, it is perfectly apparent that the Board has never sanctioned any airline's deliberate concealment from the traveling public of its overbooking practices or of the significant risk of being bumped. Concealment lies at the heart of petitioner's misrepresentation claim and, thus, at the center of this litigation. Moreover, the history of the CAB's activity in the area of overbooking practices

makes abundantly clear that the Board has consistently regarded the common law remedies of bumped passengers to be entirely consistent with, indeed supportive of, its own policies and responsibilities under the Aviation Act. Far from having sought to abridge or alter such remedies in any way, the Board has always endeavored to preserve them as a necessary and proper alternative to the optional liquidated damages remedy that is made available, in certain circumstances, under its regulations.

Apparently the first expression of concern to emanate from the CAB with respect to overbooking was an "industry letter" sent in July, 1956 by the Chief of its Bureau of Enforcement (then Office of Compliance) to all certificated air carriers.[17] The letter noted that the agency was receiving an increasing number of complaints from passengers bumped from their flights despite holding confirmed reservations. The Board's limited investigation showed that some carriers were deliberately overbooking their flights, leading to the bumping of some passengers "with consequent inconvenience and hardship to these persons and to others." The letter continued:

> While we recognize that a no-show problem exists, we do not believe that deliberate overbooking of flights is the proper solution. It is the opinion of this Office that such a practice and consequent oversales constitute an unfair and deceptive practice within the meaning of Section 411 of the Civil Aeronautics Act.

---

[17] For the convenience of the Court, a compilation of relevant CAB regulatory materials concerning reservations practices is being lodged with the Clerk.

Subsequently the enforcement bureau did initiate proceedings against two carriers under section 411 because of their alleged overbooking practices.[18] The first of these proceedings was dismissed after a hearing by the examiner, because the record showed no deliberate overbooking, but only isolated oversale incidents arising from inadvertent overbooking and other circumstances beyond the carrier's control. *Eastern Air Lines Overbooking Enforcement Proceeding*, 30 CAB 862 (1960). In affirming the examiner's determination, the Board stated:

> In closing this proceeding, we believe it is appropriate to note our approval of the action of the Bureau of Enforcement in instituting this case. Manifestly, the reservations practices of the carriers have a widespread impact on the traveling public and require scrutiny to insure that the statutory standards of section 411 are being met. Our dismissal of the particular

---

18 The Board took passing note of these enforcement proceedings in approving an industry agreement for a "no-show" program prescribing minimum time limits for purchase of tickets, reconfirmation requirements, and no-show penalties. *Air Traffic Conference of America No-Show Control Plan*, Order No. E-11658 (August 6, 1957). Acknowledging public criticism of airline oversales, the Board stated as follows:

> The oversale of space could result from several factors, including overbooking, which the Board earlier informed carriers would constitute a violation of the Act if done deliberately. There are now pending enforcement actions against two carriers which allegedly have engaged in this practice, and the Board intends to take whatever further steps may be appropriate to insulate the public from any such practices as it may find. (*Id.*)

> charges here involved is predicated upon the evidentiary record, and not upon any misgivings as to the need for the proceeding in the first instance. (*Id.* at 865.)

In the second case, *National Airlines, Inc., Enforcement Proceeding*, 31 CAB 390 (1960), the carrier admitted that it intentionally overbooked some flights, but claimed that the overall public interest was advanced, not harmed, by this practice. The examiner found that intentional overbooking was an unfair and deceptive practice, from which the carrier should be ordered to cease and desist. The Board, however, decided to terminate that proceeding without a final decision on the merits, opting instead to consider the questions from a broader industry-wide perspective. (*Id.* at 392.)

To gain that broader viewpoint, the Board contemporaneously issued its Order No. E-15615 (1960), instituting a proceeding entitled *Overbooking Practices of Trunkline Carriers*, Docket 11683. The purpose of this proceeding was not to discipline any carrier, but to elicit sufficient factual information so that the Board could adopt a sound regulatory policy for the future. The order noted that the agency was abandoning its earlier case-by-case approach because it was "found inadvisable to attempt to assess the overall problem on a piecemeal basis, with the delay and uncertainty which would arise from a series of decisions on partial records concerned with specific flights on individual carriers." (*Id.*) The prospect for swift adoption of an industry-wide approach to overbooking quickly evaporated, however, when virtually all of the major trunk lines filed information responses strongly denying the suggestion that they engaged in

deliberate overbooking.[19] Despite these denials, the agency staff concluded in a draft report on the basis of the information available that substantial overbooking, either inadvertent or intentional, was occurring and that a not insignificant number of passengers were being inconvenienced.

Instead of pursuing its *Overbooking Practices* investigation, the Board in 1961 authorized the trunk carriers to renew previously abandoned efforts to develop an acceptable no-show control plan.[20] In March, 1962, the CAB approved an industry plan calling for ticketing time limits and reservations charges, conditioned upon a provision granting compensation to passengers denied boarding under certain circumstances.[21] See *Domestic Trunkline No-Show Plan*, Order No. E-18064, 35 CAB 881 (1962). The approval order, however, made clear that the Board was not sanctioning overbooking:

19 See, *e.g.*, Information Responses filed in October, 1960 in CAB Docket 11683 by American (p. 3); Braniff (p. 3); Delta (pp. 17-18); Northeast (p. 11); Northwest (pp. 5-6); TWA (p. 12); United (p. 11). United, for example, asserted that its policy against confirming bookings in excess of capacity "is one of the Company's prime policies and its importance is stressed through all levels of management." National Airlines (p. 13) denied that it engaged in "systemwide" controlled overbooking, and emphasized its efforts to caution passengers when an oversold condition existed (p. 17). Allegheny, as a local service carrier, was not a party to this investigation and made no submission.

20 The no-show penalty plan approved in 1957, see note 18 *supra*, had been rescinded by the carriers in August, 1958, after less than a year's experience.

21 The compensation provision in this agreement was closely parallel to the denied boarding compensation provided for in the CAB's regulations which have been in effect since 1967. See 14 C.F.R. Part 250 (1975).

> The Board's action in making provision for payment to oversold passengers should not be construed as an indication that the Board condones deliberate oversales on the part of the air carriers. On the contrary, the proposed plan is designed to provide a measure of relief for passengers who are the victims of inadvertencies. Instances of intentional oversales will be fully investigated. (*Id.* at 882.)

The Board further emphasized that the common law remedies of passengers whose reservations were dishonored would remain intact, expressly rejecting an attempt to make the denied boarding compensation an exclusive or preemptive remedy:

> The carriers, by the terms of the agreement, would incorporate into the implementing tariff a provision which would preclude the oversold passenger from seeking further redress. Thus, the language in Section (D)(2)(a) provides, in effect, that the passenger must accept the prescribed penalty as full compensation for all damages. . . . [T]o the extent that the proposed tariff provision is designed to restrict a passenger from seeking damages to which he would otherwise be entitled under the common law, we find it to be adverse to the public interest. Accordingly, we shall condition our approval of the agreement to make clear that the prescribed penalty is a minimum obligation of the carrier which, only if accepted by the passenger, would terminate the carrier's obligation.

(*Id.* at 882-83.) (Footnote omitted.)[22]

Although the industry no-show penalty agreement expired in January, 1963, the trunk carriers filed tariffs continuing in effect the provision for denied boarding compensation which, if accepted by the passenger, constituted liquidated damages for dishonored reservations. The Board expressed its general approval of this approach, but urged that it be extended to all domestic airline travel. *Domestic Trunkline No-Show Plan*, Order No. E-20859, Docket 11327 (May 25, 1964). The Board also directed the participating carriers to adopt means of advising the public about the tariff provisions, specifically including "a clear statement to the effect that the passenger is under no obligation to accept the proffered compensation in lieu of any present or future claim against the carrier." (*Id.*)

In the same order, the agency announced that it would postpone further action in its investigation into *Overbooking Practices of Trunkline Carriers* (Docket 11683). It warned the carriers not to misconstrue its action:

---

22 As one carrier noted in comments filed in the *Overbooking Practices* investigation, affirmative control by the CAB of reservations practices was not necessary, because of the availability of sufficient tort remedies at common law:

> The passenger has full and adequate protection, even without active Board regulation of booking practices. The "oversold" passenger has a good and legal cause of action to recover damages against a carrier who negligently (or willfully and falsely) advises him a seat is available when actually no seat is available.

Eastern Air Lines, Inc., Comments in CAB Docket 11683, p. 4 (Aug. 28, 1961).

> . . . we wish to make it clear that our decision to defer does not signify in any way sanction of overbooking or overselling practices. The option of the Board to take further action in the Overbooking investigation at any time such action is warranted should be clearly noted. (*Id.*)

Instead of pursuing that investigation, the Board planned to consider a rule specifying procedures for airlines to use in meeting an obligation which the Board said all carriers recognized – the need to notify passengers of overbooked conditions prior to the time of their scheduled departure.

Consideration of this more specific approach to the oversales problem began in October 1965, when the CAB proposed a rule requiring an airline to provide 12 hours advance notification to individual passengers who might be denied boarding on a particular overbooked flight, so that they might attempt to make alternate or contingent travel arrangements. *Notice of Proposed Rule Making, EDR-95*, 30 F.R. 13236 (1965). The notice explained that:

> . . . the payment of compensation to passengers does not provide a satisfactory alternative to the carriers' obligation to reduce to the maximum extent practicable the inconveniences to travelers. The protection of the traveling public requires that carriers give passengers with reserved space an adequate and reasonably timely notice where, as a result of an overbooked condition and under priority rules, they would be denied boarding if all passengers with higher priority boarded the flight. (*Id.*)

The proposal made it clear that notification would not relieve the carrier of whatever common law liability might arise from the denial of accommodation. Further, the Board said,

> [the proposed rule] does not condone or sanction intentional overbooking but is designed to discourage the use of deceptive practices and to reduce the injury or discomfort to passengers where the carrier fails to meet its reserved space commitments. The proposed provisions of §250.5 impose on the carriers the affirmative obligation to take special precautions as flight time approaches. (*Id.*)

In explaining why the rule was being proposed, the Board noted that although "the carriers all accept the obligation to advise passengers of overbooked conditions at some time prior to departure, the procedures for giving notice are not regularized, uniform, or publicly available." (*Id.*) It soon became apparent, however, that while the carriers professed a general sense of responsibility to give warnings to overbooked passengers, they were not willing to have it translated into this very specific, mandatory rule. They contended that the proposed uniform procedure would be costly, burdensome, confusing, counterproductive, and generally unworkable. In the face of unanimous industry opposition, the Board abandoned the advance notification proposal.

In January 1967, the Board announced a new proposal, which would address the problem of oversales in a different manner by endeavoring to reduce the number of incidents – then at the level of approximately 50,000 a year for the industry as a whole – and to assure more

adequate compensation when they did occur. *Notice of Proposed Rule Making, EDR-109*, 32 F.R. 459 (1967) (JA 170-94). The Board stated:

> The oversales problem . . . is a severe one. It causes distress, inconvenience and damage to passengers. It impairs the public image of air carriers, casting doubt on the integrity of their reservations practices. Clearly, it is incumbent on the Board and the carriers to do all within their powers to eliminate oversales to the extent feasible. (JA 173.)

However, the carriers had persuaded the CAB that *overbooking* was a relatively minor factor in the oversale problem, and that factors such as "free-sale" and "block ticketing" practices, substitution of smaller aircraft, human error, and equipment malfunctions accounted for most denials of boarding. (JA 175-76.) Rather than involve itself in the detailed regulation of air carrier reservation practices, either by imposing a complex notification system or by exercising its powers to prohibit overbooking outright, the Board again concluded in EDR-109 that the best approach would be to assure prompt, effective, and adequate monetary compensation to passengers denied boarding for whatever reason, and to exhort carrier managements to improve their systems. As the Board explained,

> . . . the reservations practices of the carriers involve detailed methods of doing business, personnel supervision, use of equipment, adaptation to technological change, etc., requiring a high degree of management flexibility and freedom. Since these matters are within the special province and competence of carrier management,

> it is desirable that the Board attempt to minimize to the extent possible regulation of the details of the carriers' reservations systems. But by the same token, it is incumbent on the carriers themselves to take effective steps to curb oversales resulting from their reservations practices. (JA 178.)

In August 1967, the Board adopted the Part 250 regulations, reaffirming its determination "to refrain from detailed regulation of the carriers' reservations policies." *Regulation No. ER-503, Enactment of Part 250,* 32 F.R. 11939 (1967) (JA 195-223.) The central feature of the CAB rule was the provision for compensation to passengers denied boarding, which the Board made clear was not to preclude pursuit of common law remedies unless the compensation was in fact accepted as liquidated damages. Passengers should not be forced to make an immediate decision as to whether or not to accept the tender of liquidated damages, the Board held, but "should instead be given the opportunity of making the election after the consequences of denied boarding have occurred and are known to them." (JA 211.)

Since 1967 the Board has on several occasions amended its regulations concerning denied boarding.[23] But it has

---

[23] ER-588, 34 F.R. 14281 (1969) (providing for passenger's option to reject certain alternate transportation arrangements offered in lieu of denied boarding compensation); ER-681, 36 F.R. 7306 (1971) (providing for public disclosure of certain carrier data supplied under §250.10); ER-727, 37 F.R. 6924 (1972) (changing office designated to receive copies of carrier denied boarding priority rules and procedures); ER-804, 38 F.R. 14822 (1973) (amending definition of confirmed reserved space to include reservations (continued)

clearly and persistently rejected the option of trying to exercise close, uniform control over all carriers, choosing instead to give each carrier latitude to design and operate its own reservations system, consistent with its own tariff rules. At the same time, the Board has continued to be concerned that the particular practices employed by the carriers not deceive the public, and it has continued to view common law actions as providing bumped passengers with appropriate remedies in the alternative to denied boarding compensation. For example, in June 1973 the Board amended Part 250 to include foreign air carriers. In that proceeding, the Board again underscored its concern about the deceptive aspects of overbooking, noting that under Part 250, bumped passengers "are given the option to either accept denied boarding compensation as liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide him with confirmed reserved space, or to pursue their remedy under the common law." *Notice of Proposed Rulemaking, EDR-248,* 38 F.R. 15083, 15084 (1973).

In sum, the CAB has never exercised its power under section 411 to ban overbooking outright, although it has threatened such action from time to time. Instead, after considering several possible alternatives, the agency has determined to avoid involving itself in the detailed regulation

---

[23] (continued)
of space in any manner provided for in carrier's tariff); ER-827, 38 F.R. 27604 (1973) (expansion of applicability to include certain operations in Alaska); ER-880, 39 F.R. 38087 (1974) (expanding Part 250 applicability to include certain operations of foreign air carriers); see also PS-52, 38 F.R. 14823 (1973) (defining oral confirmation of reserved space to be unfair or deceptive practice where tariff provides only for written confirmation); PS-58, 39 F.R. 38905 (1974) (extending PS-52 to cover foreign air carriers).

of carrier reservations practices. Its decision seems to have been motivated in part by the monumental practical difficulties close regulation might entail and in part by a conviction that the public interest is better served if the Board allows carrier management maximum flexibility and room for innovation, while at the same time providing passengers with a choice of remedies that will encourage the carriers to eliminate deceptive or harmful elements from their systems. The Board has repeatedly made clear that carriers, if they overbook, do so at their own peril, and it has refused to sanction any such practices so as to shield them from whatever common law liability may arise from misrepresentations or dishonored reservations. *Compare, Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973).

The Board's entire regulatory program has been keyed to the notion that concurrent jurisdiction lies in the agency and in common law courts to deal with such problems. *Cf., Head v. New Mexico Board of Examiners,* 374 U.S. 424, 432 (1963); *Double-Eagle Lubricants, Inc. v. State of Texas,* 248 F.Supp. 515 (D. Tex. 1965), *appeal dismissed,* 384 U.S. 434 (1966). Thus, it is clear that there is no conflict whatever between petitioner's common law claims and CAB regulatory policies as developed over the past decade and a half. Nor do his claims interfere in any way with any policies the Board may wish to adopt prospectively for, as Senior Circuit Judge Fahy correctly pointed out in his dissenting opinion, whatever the court might decide regarding this case, the Board remains free to exercise its statutory powers to control future airline reservations practices in accordance with the policies of the Aviation Act. (Pet. App. A 53.)

II. THERE IS NOTHING EITHER EXPLICIT OR INHERENT IN THE AVIATION ACT THAT IS INCOMPATIBLE WITH ALLOWING PASSENGERS TO PURSUE THEIR COMMON LAW REMEDIES FOR DELIBERATE NONDISCLOSURE OF OVERBOOKING

In the court of appeals, respondent argued that the existence of section 411 was sufficient to oust the courts of jurisdiction to adjudicate claims for common law misrepresentation involving companies subject to CAB regulation. Thus, according to respondent, since the CAB had the power to ban overbooking as "unfair or deceptive" under section 411 of the Aviation Act, and even though it had not done so, petitioner's common law remedies for fraudulent misrepresentation were abrogated, and he was left without a remedy other than the denied boarding compensation which he had declined. The court of appeals rejected that broad claim of immunity, relying on the history and purpose of section 411 and the savings provisions of section 1106, which it found would have to be ignored in order to sustain respondent's position. (Pet. App. A 28-29.)

In so holding, the court of appeals was plainly correct. Initially it should be noted that nothing in section 411 – or any other provision of the Aviation Act for that matter – suggests that the powers granted to the CAB were intended to modify in any way traditional controls over deceptive practices under state common law or statute. See *American Airlines v. North American Airlines,* 351 U.S. 79, 83 (1956); *cf., Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332, 337 (3d Cir. 1975); *Holiday Magic, Inc. v. Warren,* 357 F. Supp. 20, 28 (D.Wis. 1973), *vacated on other grounds,* 497 F.2d 607 (7th Cir. 1974).

Section 411 was modeled on section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended by the Wheeler-Lea Amendments of 1938. See *American Airlines v. North American Airlines*, 351 U.S. 79, 82 (1956); Hearings on Regulation of Transportation of Passengers and Property By Aircraft, Before A Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess. 514 (1937) (Statement of E.S. Gorell, President of Air Transport Association of America). Since section 5 was intended to provide new and additional administrative remedies, not to assign to one small agency in Washington the exclusive role of determining for all purposes what is and what is not deceptive, *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), section 411 must be construed in that light as well. This is particularly appropriate in view of section 1106 which provides that "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506. To rule that section 411 automatically preempts all common law remedies involving unfair or deceptive practices would be to override section 1106, and this the court of appeals correctly refused to do.

That refusal was appropriate for another reason as well. This Court has construed section 411 to apply only to those practices which the CAB decides are of broad public interest and not to every activity which might arguably be unfair or deceptive. *American Airlines v. North American Airlines, supra.* To interpret section 411 in the manner suggested by respondent would require the CAB to concern itself with all manner of trivial issues in order to assure that section 411's prohibition extended to any

conduct arguably within its ambit. Such a position would run counter to the broad public interest purpose of section 411.

Nonetheless, the majority of the court of appeals ruled that a damage claimant may not maintain a common law action against an airline for intentional, tortious misrepresentations, without first litigating before the CAB to determine whether the conduct is deemed "unfair or deceptive" under section 411. Thus, at least where a CAB-regulated company is concerned, the common-law standards of liability for fraud and deceit developed over the course of hundreds of years have been modified by the addition of a new, threshold test derived from federal legislation – namely, whether there has been a violation of section 411. If no such violation is found, it was held, the common law action would necessarily fail and the remedies otherwise available would be extinguished. (Pet. App. A31.)[24]

The court below seems to have correctly recognized that its holding involves a fundamental "alteration of the common law." (*Id.*) Indeed on its face it presents a square conflict with the savings provisions of section 1106, but the court held that section 1106 could not be read literally and must be examined in light of the remainder of the Aviation Act to determine whether the particular common law action survives, relying on *Texas & Pacific Ry. Co. v. Abiline Cotton Oil Co.*, 204 U.S. 426 (1907).

---

[24] This result was reached by the court, *sua sponte*, and was not argued by any party or amicus including the CAB, on which the burden of conducting such proceedings would devolve.

(Pet. App. A31.) Petitioner does not dispute the general proposition that in some specific instances the overriding purpose and operation of a federal regulatory statute will be so inconsistent with the continuing vitality of a common law remedy that the remedy cannot survive, notwithstanding a provision such as section 1106; his position is simply that the facts of this case do not place it within the narrow group of cases to which that proposition applies.

The fundamental flaw in the approach of the majority below is that it focuses on the refusal of this Court in *Texas & Pacific Ry. Co., supra,* to apply a savings clause similar to section 1106, but fails to examine the special circumstances and reasons that led to that result. In that case a shipper sued for overcharges, claiming that the railroad had exacted an unreasonable rate in violation of the common law. The rate in question, however, was filed as required by the Interstate Commerce Act; the carrier was required to charge it and no other rate until it had been disapproved by the ICC or a new tariff had been accepted. Therefore, if a court were to hold the rate unreasonable, the carrier would be violating the federal law if he gave the shipper the court-awarded refund. Since this Court found that one of the primary purposes of the Interstate Commerce Act was to eliminate discrimination among shippers, and that to allow the common law remedy to survive would result in that very discrimination, albeit in a different form, this Court ruled that the retention of the common law action based on unreasonable rates would be "absolutely inconsistent" with the Interstate Commerce Act, so that the savings provision could not apply. "In other words, the act cannot be held to destroy itself." 204

U.S. at 446. Or as the Court said in an earlier portion of that opinion:

> a statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required; that is to say, unless it is found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provisions nugatory. (*Id.* at 437.)[25]

Judged by that standard, it is apparent that the majority below was in error in its holding that petitioner's common law rights were necessarily altered by the Aviation Act. While it cannot be doubted that the effects of no-shows and overbooking may show up in a carrier's profit or loss column, that is true of virtually every aspect of its operations. That, therefore cannot be the touchstone

---

[25] See also *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915):

> That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like.

for overruling section 1106 as the majority below suggested. (Pet. App. A30.) Similarly, deliberate and undisclosed overbooking is not a practice which is integral to respondent's rates and fares, since it is not set forth in any tariff and has never been required by the CAB to be filed under section 403(a). A practice which respondent has concealed from the public obviously stands on a very different footing from a publicly filed tariff insofar as section 1106 is concerned.[26]

Nor is this an area where uniformity is essential, so that retention of common law rights would be inherently repugnant to the Aviation Act. The best evidence of the absence of need for uniformity is the action, or more properly non-action, by the CAB each time it has considered the possibility of issuing uniform standards for

---

26 The filing of tariffs insures that all parties are aware of the rules under which the carriers are operating, and section 403(a) of the Aviation Act requires that the carriers file tariffs showing the fares and rates to be charged, as well as such other "classifications, regulations, rules, practices and services in connection with such air transportation" as the CAB may require. Thus, while the CAB might have required the airlines to file information regarding their overbooking practices, it has not done so, and respondent has not chosen to do so voluntarily. The result is that the public has been kept entirely unaware of these practices and thus has been unable to guard against them. If Allegheny had filed an overbooking tariff, the public would have been on constructive notice thereof, and any challenge to the legality of its practice would have properly been raised in the first instance before the CAB. See *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972) and *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., supra.* Having failed, however, to disclose its practices in its tariff filed at the CAB, the respondent cannot now seek insulation from the CAB from its liability for misrepresentation.

all carriers concerning their reservation practices. First, there is no requirement that carriers provide reservations for their flights (JA 117), and non-reservation services have been highly successful in some major markets (*e.g.*, the Eastern Air-Shuttle). Similarly, while most carriers now provide for confirmation of reservations by telephone, the CAB has repeatedly made clear that they are not obliged to do so, with the matter left entirely to the carrier's own judgment. See PS-52, 38 F.R. 14823, 14824 (1973); PS-58, 39 F.R. 38095, 38096 (1974).

Most importantly with regard to the overbooking question, the CAB has on numerous occasions considered proposals that would have taken the discretion from the airlines and established across-the-board standards that all the carriers would have to meet. Yet each time the Board has opted in favor of stimulating airline management to innovate and improve their reservation systems, rather than imposing a uniform, inflexible federal regime in this area. Plainly, this *laissez faire* attitude on the part of the CAB is wholly inconsistent with any claimed need for uniformity, and surely falls well below the standard of outright repugnancy established in the *Texas & Pacific* case as the test for overriding a specific savings clause such as section 1106.

Indeed this has been clearly demonstrated by an innovative approach conceived by Eastern Air Lines, which was approved in *Delta Air Lines, Inc. v. CAB*, 455 F.2d 1340 (D.C.Cir. 1971) (affirming CAB Order 71-6-120). Eastern's proposal provided for a system of limited overbooking in which passengers subject to a denial of boarding would be advised at the outset of their status, a status with both advantages (*e.g.*, the possibility of being

compensated if there is no space available) and disadvantages (e.g., the possibility of not being accommodated on the flight). A major benefit of this system, as the court of appeals noted in *Delta*, is that the passenger is fully apprised of all the facts, and it is entirely his own decision whether the arrangement offered is acceptable.[27] While this concept was originally approved for only a nine-month trial period, it is still in effect almost five years later on Eastern and has since been added by several other carriers. At a minimum the CAB's continuation of its permission to operate a different kind of reservations system demonstrates that uniformity is hardly essential in this area.

Finally, whatever may be said of the need for standardized reservations practices regarding overbooking, there is no purpose of the Federal Aviation Act of which we are aware that is fostered by the refusal of Allegheny and other carriers to disclose their practices to the public, let alone by their willful concealment in the face of direct inquiries about them. Unless it can be shown that Congress required the CAB to give paramount consideration to uniformity in all aspects of airline operations, it is difficult to imagine how a system which deludes more than 100,000 passengers annually into believing they have confirmed reservations, and then leaves them stranded at the gate, can be said to be so important to the aviation system in this

---

[27] In a related context the Board has underscored the importance of full disclosure in connection with the confirmation of reserved space by telephone, concluding that "if the customer is told in clear and unmistakable language that his reservation is only tentative . . . we have no reason to believe . . . that the prospective passenger will be confused as to the status of his reservation." PS-52, 38 F.R. 14823, 14825 (1973).

country that it eliminates the common law remedies of those who are injured by it. Concealment and misrepresentation are plainly not essential ingredients in an airline reservation system, and there is utterly no public interest in insulating those who use such practices from damage actions under the common law. Accordingly, the majority below was in error in holding that section 411, either alone or in conjunction with other portions of the Aviation Act, requires a uniform policy, imposed by the CAB, for all reservation practices including concealed overbooking.

III. THE CIVIL AERONAUTICS BOARD HAS NO POWER TO INSULATE DELIBERATE NONDISCLOSURE OF OVERBOOKING BY AIRLINES FROM LIABILITY UNDER THE COMMON LAW, AND CERTAINLY COULD NOT DO SO RETROACTIVELY AS THE COURT OF APPEALS HELD.

In dictating that the trial court must refer petitioner's common law misrepresentation claim to the CAB for a determination of whether Allegheny's conduct was deceptive under section 411, the court of appeals has seriously misconceived that agency's functions and powers. This is not a case where petitioner bases his claim for damages on a violation of section 411, in which case the court would first have to decide whether any such cause of action existed[28] and then whether the tests of section 411 had been met. This case has not been referred to the CAB by the court of appeals in order to establish petitioner's right

---

[28] *Cf. Polansky v. TWA, supra; Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

to recovery, but rather to provide an opportunity for the agency to insulate the carrier from liability for its practices.

The appellate court's conclusion that the CAB could perform such a function arose from its belief that the Aviation Act "must be read broadly to include the approval in the public interest of some practices that might be considered common law misrepresentations." (Pet. App. A 30.) This, we believe, was a crucial misreading of that statute. Section 411 provides authority to the CAB *only* to investigate the practices of its regulatees and, when they are found to be unfair and deceptive, to issue cease and desist orders, and even this authority can be exercised *only* when the public interest so requires. Nothing in that section even purports to empower the agency to approve fraudulent misrepresentations that are otherwise actionable at common law. And to infer such authority from section 411 would turn its fundamental purpose – the protection of consumers from potentially deceptive acts or practices – on its head.[29]

Nor is there any other provision of the Act that authorizes the Board to approve intentional deceptions by an air carrier. To be sure, the agency has a legitimate concern in seeing that the companies it regulates make a reasonable return on their investment, but its general interest in

---

[29] See *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *Holloway v. Bristol-Myers Corp.*, *supra*, as to the legislative history of section 5 of the Federal Trade Commission Act, upon which section 411 is based.

their profits and financial welfare can hardly be translated into a license for deceit. Concededly, some kinds of tortious misrepresentations might be of financial benefit to an airline, and such benefits might somehow be passed through to the public in lowered fares. Yet that would still be no basis to infer a sweeping power in the CAB to insulate such conduct from accountability at law to those injured by the deception – nor, it might be noted, has the agency ever claimed to have such a power. As Mr. Justice Cardozo wrote in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78-79 (1934):

> But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency . . . . The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

That is not to say, however, that the CAB could never approve overbooking, for petitioner does not contend that overbooking is *per se* deceptive at all times and under all conditions. Indeed, when one carrier demonstrated that its proposed overbooking system would not be deceptive because all participants would be fully informed, its tariff regulations were quite properly approved and allowed to go into effect. *Delta Air Lines, Inc. v. CAB*, 455 F.2d 1340 (D.C.Cir. 1971). What is at issue here, however, is not just Allegheny's overbooking, but its deliberate concealment of that material fact in confirming petitioner's

reservation. That conduct is simply beyond the CAB's power to approve. *Cf. Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 211-212 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

Even assuming for the sake of argument that the court of appeals was right in inferring authority for the CAB to approve fraudulent conduct and shield it from future liability, the concept that it could do so *retroactively* – issuing ad hoc determinations after injuries have already occurred to extinguish any cause of action – cannot be supported. Even where the agency has been given express power to insulate particular conduct from liability under the antitrust laws, this is not done on a retroactive basis.[30] In *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), for example, this Court held that a private antitrust suit for damages could not proceed where the CAB had actually taken jurisdiction over and approved the transactions and relationships which were at the heart of the controversy. If the agency had declined to approve the transactions or to exercise its regulatory jurisdiction, it is inconceivable that this Court would have felt it appropriate to send the case back to see whether the Board might want to give retroactive approval. Whatever immunizing powers the Board may have in these areas is inherently prospective, not retroactive in nature. See *Pan American World Airways*

---

30 Under the CAB's "Sherman Doctrine", the Board's policy is to refuse retroactive approval to otherwise illegal relationships with and between air carriers except in emergency and *de minimus* situations. *Sherman Control and Interlocking Relationships*, 15 CAB 876 (1953).

v. United States, 371 U.S. 296, 305 (1963); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., supra.*

The CAB's powers are broad, but not limitless. The fact that the court of appeals might think that the agency should have the power to approve affirmative misrepresentations "in the public interest" in the manner contemplated by its decision is irrelevant, for the Board's powers are necessarily limited to those assigned it by Congress. *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322 (1961). And those powers do not include those inferred by the majority below.

IV. ALL DOUBTS ON THE QUESTIONS OF STATUTORY INTERPRETATION SHOULD BE RESOLVED AGAINST THE DECISION BELOW, BECAUSE IT DISRUPTS THE ALLOCATION OF FUNCTIONS BETWEEN THE COURTS AND THE CIVIL AERONAUTICS BOARD.

Since this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), it has been clear that the powers of the CAB under section 411 are to be exercised only as a means of vindicating the public interest, and not to adjudicate the rights and liabilities of parties in private disputes. As Senior Judge Fahy correctly noted in his dissent, section 411 "looks only to the future cessation of practices determined by the Board to be unfair or deceptive," having nothing whatever to do with remedies "for past tortious conduct of a carrier injurious to an individual." (Pet.App. A 51.) The courts of law, rather than the regulatory agencies charged with the protection of the overall public interest, are available for

the resolution of private controversies involving air carriers.[31]

The court of appeals has sharply departed from that rule. Its holding that damages may not be awarded against a regulated airline for its past tortious acts, without first referring the matter to CAB for a ruling as to whether the conduct is deemed unfair or deceptive under section 411, will deeply affect the historic relationships between federal agencies and courts throughout the nation – not only the federal courts, but state and local courts as well. The decision effectively withdraws from judicial bodies at every level their traditional role in adjudicating private tort claims under both the common law and specific statutes, and reassigns an important part of that job to a federal administrative agency. Yet the circuit court never mentioned and apparently did not even consider the effect its decision would have on these important functional divisions of responsibilities as between the state and federal courts and the federal regulatory agencies.[32]

---

31 See *North American Airlines, supra,* 351 U.S. at 83. See also *Cort v. Ash,* 422 U.S. 66 (1975), in which this Court admonished that federal regulatory statutes should not be construed as intruding into those areas traditionally committed to state law, such as the resolution of individual claims for damages, unless essential to their central purposes. See also *Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332, 337 (3d Cir. 1975).

32 While the particular decision here involves only the airline industry and its relationship to the CAB, the logic of the majority's holding would appear to be equally applicable to other regulatory agencies and other regulated industries. Thus, if the appellate court were correct as to the immunizing effect of a determi-
(continued)

Moreover, the court of appeals has seriously misconstrued the Board's role under section 411 as illuminated by this Court's *North American Airlines* decision. The existence of unfair or deceptive practices in the airline industry does not automatically trigger investigations, cease and desist proceedings, or other adjudications before the Board; only when the Board – *not* the court of appeals – makes a specific determination that the public interest requires the use of its section 411 powers does that provision come into play. 351 U.S. at 85. The decision below simply ignores the fact that it is the agency's duty to decide whether and when these powers should be invoked, in effect forcing from the Board an adjudication of whether certain carrier practices should be condemned or approved on an industry-wide basis.

---

32 (continued)
nation by the Board that a particular practice is not deceptive under section 411, a similar determination by the Federal Trade Commission that certain conduct is not deceptive under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, would likewise seem to extinguish any common law liability for such conduct. By the same token, the Securities and Exchange Commission would seemingly have authority under sections 10(b) and 14(a) of the Securities and Exchange Act, 15 U.S.C. §§ 78j(b), 78n(a), to retroactively sanction and immunize the use of statements in the sale of securities or in proxy materials that would be misleading under state law. In either case, actions in state or federal courts seeking damages for misrepresentation would have to be stayed pending referral to the federal agency – a result certainly hard to square with this Court's decision in *J.I. Case Co. v. Borak,* 377 U.S. 426 (1964), or with the D.C. Circuit's decision in *Holloway v. Bristol-Myers Corp., supra.*

As the Board's actions in the area of reservations practices demonstrate, many factors go into its determination of whether, and if so, how to regulate any particular matter – including limitations on its own available resources, the difficulties involved in regulation, the availability of other forms of relief for affected persons (such as suits at common law), and many other variables. This careful balancing would be entirely undone by the reallocation of functions mandated by the court below.

As a practical matter this agency can deal with no more than a handful of section 411 proceedings each year; yet the decision below would thrust upon it referrals from local, state and federal courts throughout the country to pass upon the incredible variety of claims filed against regulated companies – not only airlines, presumably, but travel agents, tour operators, freight forwarders and other "indirect air carriers" – that arguably fall within the concept of unfair or deceptive practices under section 411. A determination by the Board on any of these would require full adjudicatory hearings, and the decision would have to be supported by substantial evidence – followed, presumably, by judicial review proceedings in which the agency would have to defend its decision. (Pet. App. A 30.) For an agency which already has severe difficulties in processing its workload,[33] such an additional burden would be disastrous.

---

[33] See, *e.g.*, E. Wolff, *et al.*, Report of the Civil Aeronautics Board Advisory Committee on Procedural Reform, pp. 5-9 (1975); J. Landis, Report on Regulatory Agencies to the President-Elect (1960).

The implications of this decision and the fundamental changes it would bring about in the respective allocations of decisional powers among courts and agencies are extensive and various. Thus, it would seem that a private party who was unable to generate interest directly at the CAB in taking up his particular cause under section 411 would now have an indirect avenue to compel the agency to consider the matter – simply file a damage action under common law tort theory and await "referral" to the Board as mandated here by the court of appeals. Surely this was not how the statute was designed to operate. *Cf. Federal Trade Commission v. Klesner,* 280 U.S. 19, 25 (1929). In short, the unprecedented decision of the circuit court will have an enormously disruptive impact on both courts and agencies, not to mention litigants. That kind of change must be made by Congress, not the courts.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals requiring referral of petitioner's common law claim to the Civil Aeronautics Board should be reversed.

Respectfully submitted,

REUBEN B. ROBERTSON III
ALAN B. MORRISON
LINDA F. DONALDSON

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

January 9, 1976